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CITATIONS

774905—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 48–55) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 6, 1947 (R. 55). The petition for a writ of certiorari was filed on December 17, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether a contractor may recover from the Government for increased wages paid to carpen-

ters who had refused to work for $1.25 an hour, the minimum contract rate based on a determination by the Secretary of Labor of the prevailing wage rates, where the contractor was prohibited from paying more than the prevailing wage rate because of wage stabilization orders, and where the Secretary of Labor modified his determination of the prevailing wage rate for carpenters by increasing it to $1.35 at the contractor's request and on the understanding that no claim against the Government was to be made for additional compensation on account of the increased labor costs.

2. Whether a contractor with the Government who was required by one of the general conditions of the contract to protect all work and material from damage by cold, is relieved of that requirement as to piers erected under the contract, where the only feasible method of protecting them from frost action was by placing earth around them, and where under the specifications relating to excavating and grading the contractor need not provide fill.

STATUTE, EXECUTIVE ORDER, AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Davis-Bacon Act, as amended, Executive Order No. 9250, and Contract NY–30083 are set forth in the Appendix, *infra*, pp. 16–18.

STATEMENT

Petitioner instituted this action in the Court of Claims on April 2, 1945, to recover compensation

on three items of claim arising out of certain contracts entered into between petitioner and the National Housing Agency, Federal Public Housing Authority (R. 1–25). Item II of the claim was withdrawn, leaving only Items I and III for determination by the court (R. 27).

ITEM I

On June 9, 1942, petitioner entered into contract NY–30082 with the National Housing Agency, Federal Public Housing Authority, for the construction of housing at Massena, New York (R. 26). Article 17 of this contract, which embodied the terms of the Davis-Bacon Act, as amended, *infra*, pp. 16–17, required the contractor to pay wages computed at rates not less than those stated in the specifications, those rates being based on a determination by the Secretary of Labor that they were the prevailing wage rates in the particular locality (R. 20, 27–28, 29). For journeymen carpenters the minimum hourly wage rate, as fixed by the specifications, was $1.25 (R. 29). Petitioner's subcontractor handling the carpentry work on this contract consistently paid carpenters at the hourly rate of $1.35 instead of $1.25, however, and when petitioner later took over the carpentry work from the subcontractor it continued to pay carpenters at the higher rate (R. 30).

On December 2, 1942, petitioner entered into a

second contract, NY–30083, for the construction of additional housing at Massena, N. Y., with provisions requiring the payment of minimum wages identical with those in the first contract (R. 27–29). In computing estimates for its bid on this contract, petitioner used a wage rate of $1.25 per hour for carpenters, petitioner having some hope that carpenters would be released from other large construction projects in such numbers that they could be obtained at this rate for the work under the second contract (R. 30). Carpenters began work on this project on December 23, 1942, continuing to work intermittently until the latter part of February 1943, all being paid by petitioner at the hourly rate of $1.35 (R. 30).

Meanwhile, the President, on October 3, 1942, acting under the authority of the Stabilization Act of 1942 (56 Stat. 765; 50 U. S. C. App., Supp. V, 961–971) had by Executive Order No. 9250 (7 F. R. 7871) "frozen" wages at the rates prevailing on September 15, 1942, and prohibited any increase or decrease in wages which was not approved by the National War Labor Board. Thereafter, on February 23, 1943, petitioner advised the carpenters' union that under Executive Order No. 9250 it could not pay more than $1.25 per hour on Project NY–30083 (R. 31). Upon receiving this advice the carpenters refused to work at that rate and stopped work on the project (R. 30–31).

After some negotiation, petitioner's president and secretary conferred in May 1943, with an official of the Federal Public Housing Authority, who advised that he would go with them to see an official of the Wage Determination Section of the Department of Labor and attempt to obtain a modification of the wage rate quickly, if they would agree that there would be no increased cost to the Government by reason of such modification (R. 34). This was in accord with the policy of the Labor Department (R. 35). The alternative was to apply to the Wage Adjustment Board for an increase in the wage rate, a procedure which would have required a longer period of time before a decision could have been obtained (R. 34). Petitioner's representatives led these Government officials to believe they had agreed that there would be no increase in the cost of the project to the Government if the wage rate should be increased, but they did not affirmatively commit themselves to withhold claim for additional compensation in such event. They knew, however, that they had created this impression and did not correct it. (R. 34.) As a result of this conference, the Secretary of Labor modified his determination of August 10, 1942, by substituting $1.35 for $1.25 as the prevailing wage rate per hour for carpenters (R. 35). Petitioner was informed of this modification by telegram of June 4, 1943 (R. 35). Thereupon petitioner employed carpenters

at $1.35 per hour and proceeded with the work under the contract, in the course of which it paid $3,662.30 more for the wages of journeymen carpenters than it would have paid had the hourly rate been $1.25 (R. 36).

On these facts the court below held that the United States was not liable for the increased costs resulting from the payment of the higher wages, and accordingly refused to allow a recovery on this portion of Item I of petitioner's claim (R. 47, 48–52).[1]

[1] The remaining portion of Item I was based on the payment of an increased wage rate to common laborers. The contract minimum rate was 65¢ per hour, which was the rate fixed by the Secretary of Labor as the prevailing wage rate (R. 36). On February 9, 1943, this rate was increased by the Wage Adjustment Board to 80¢ per hour (R. 36–37). This ruling amounted to no more than permission to pay 80¢ per hour and was not a requirement that petitioner do so. *Employees Group of Motor Freight Carriers* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 735. When petitioner refused to pay the higher rate, a subordinate of the contracting officer, acting without authority, advised that this refusal was a noncompliance with the terms of the contract and threatened to report the matter to the Department of Labor (R. 39). Petitioner thereafter paid the increased wages without appealing to the contracting officer or the head of the department. Judgment was entered for $2,659.47 for the increased wages so paid. (R. 40, 47.) While we believe that this was error, in that the court below held the Government liable because of the act of a subordinate official which was clearly unauthorized, especially since petitioner made no effort under Article 15 of the contract to obtain a ruling from the contracting officer or to appeal to the head of the department concerned, we did not consider that this apparently isolated departure from the rule

Item III

The piers for 31 of the 35 buildings to be constructed under the second contract, NY–30083, were erected by petitioner between October 26 and November 26, 1942, and in intermittent working periods during December 1942 (R. 41).[2] It was anticipated that the foundations for the project could be completed before cold weather set in, and that work on the superstructures could go forward during the winter (R. 41). However, little progress was made on the superstructures, as petitioner laid girders on the piers for only five buildings (R. 41). The Government granted extensions of the contract time to cover all delays (R. 42).

The piers were inserted 3½ feet in the ground at the natural grade, which was later found to be somewhat lower than indicated on the plans (R. 42). In the absence of superstructures being placed on them, the only feasible method of protecting them against frost action would have been by placing earth around them (R. 42). If the grade had been as indicated in the drawings the

announced by this Court in *United States* v. *Holpuch Co.*, 328 U. S. 234, 239, and *United States* v. *Blair*, 321 U. S. 730, 735, was of sufficient significance to warrant seeking a review by this Court.

[2] This work was begun under Change Order No. 20 to the first contract, NY–30082, in anticipation of the execution of the second contract, in order that construction of the superstructures might begin as soon as the second contract was executed (R. 40–41).

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piers would have had more protection (R. 42). Petitioner did not grade or place fill around the piers, except to backfill earth removed in excavating (R. 42). During the winter frost action tilted approximately half of the piers out of line (R. 42). Petitioner realigned the piers, the fair and reasonable price of the work done being $11,500.93 (R. 46). Petitioner claimed additional compensation for this work on the ground that placing earth around the piers was the only feasible method of protecting them from frost, that under the specifications to contract NY–30083 it was not required to provide fill and that there was no specific provision in the change order under which this work was done requiring it to protect or maintain the piers pending the placing of the superstructures on them (R. 42, 45–46). There was, however, a general condition in both contracts requiring petitioner to protect all work and material against damage from dampness and cold, and because of this provision the court below held that petitioner could not recover the expense of resetting the piers (R. 42, 47, 54–55).

ARGUMENT

In connection with its claim under Item I, petitioner contends that the first determination of the Secretary of Labor as to the prevailing wage rate was erroneous, and that it misled petitioner to its detriment, and that the subsequent modification of that determination increasing the

rate entitles it to recover the increased wages paid by it. Petitioner further contends that the court below erred in holding that it had waived, or was estopped to assert, its claim for additional compensation based on the payment of increased wages. (Pet. 7, 20–21.) We submit that the holding of estoppel is fully sustained by the evidentiary findings of the court below, and that the original determination of the Secretary of Labor as to the prevailing rates did not mislead petitioner to its detriment.

(a) With regard to the conference between petitioner's representatives and the officials of the Federal Public Housing Authority and the Department of Labor, the court below found that petitioner's representatives did not affirmatively agree to withhold claim for additional compensation should the carpenters' wage rate be increased, but found further that "Neither did they at that time affirmatively correct the impression, which they knew was held by both the Assistant Director and the Assistant Solicitor, that they had agreed that the wage-rate increase would not result in added cost to the Government" (R. 34). The court below found also that it was the policy of the Labor Department to correct wage-rate determinations only in cases in which it appeared that such correction did not involve additional cost to the Government for construction on which such wage rates were to be paid and that, where such additional cost was involved, the question

was referred to the Wage Adjustment Board for appropriate action (R. 35). In such circumstances petitioner's representatives, having created a false impression that they agreed to withhold a claim (based on increased wages), were clearly under a duty to correct that impression before the officials of the Government had acted in reliance upon it. The finding of the court below that they did not do so, which finding is not questioned, is sufficient to estop petitioner from contending now that there was no agreement to waive the claim for excess costs, under the familiar rule that one who by his acts or representations, or by his silence when he ought to speak out, induces another to believe certain facts to exist, is estopped to deny the existence of such facts where the latter, having acted on such belief, would be prejudiced by such denial. *Gregg* v. *von Phul,* 1 Wall. 274, 281; *Dustin Grain Co.* v. *McAllister,* 296 Fed. 611 (C. C. A. 8); *Crane Co.* v. *James McHugh Sons, Inc.,* 108 F. 2d 55, 59 (C. C. A. 10); *In re Walton Hotel Co.,* 116 F. 2d 110 (C. C. A. 7).

(b) Petitioner was not misled as to its prospective labor costs by the original determination of the prevailing carpenter wage rates by the Secretary of Labor. To avoid the effect of the estoppel, petitioner contends that "The effect of the ruling of the Court of Claims is to give force

to the refusal of the Secretary of Labor to properly perform the duty imposed by the statute unless, as a condition, petitioner waive such rights as it might have" (Pet. 21). This contention is based on the assumption that the first determination of the prevailing wage-rate by the Secretary of Labor was erroneous and that, therefore, petitioner was entitled as a matter of right to have that determination corrected. As petitioner itself recognizes, however, this assumption is not supported by any finding of the court below (Pet. 19).

Petitioner's dilemma arose out of the fact that it had been paying carpenters working on Project NY-30082 $1.35 per hour, which was more than the minimum rate required to be paid by that contract, and that thereafter they refused to work for less than $1.35 per hour on the second project, even though wartime wage stabilization legislation then prohibited the payment of more than the minimum rate (R. 30-31). The ordinary method of dealing with such problems was to apply to the Wage Adjustment Board for an increase in the wage rate, where a decision could be obtained in two or three months. Petitioner declined to participate with the carpenters' union in such an effort. (R. 34.) Instead, almost three months after the work stoppage began, petitioner sought the aid of the Assistant Director of the Labor

Relations Division of the Federal Public Housing Authority, and was told that the situation might be taken care of quickly by a modification of the Secretary of Labor's finding as to the prevailing wage rate, on condition that petitioner agree that there would be no increased cost to the Government by reason thereof (R. 34). Since Executive Order No. 9250 "froze" wages at the September 15, 1942, level, which, with respect to the carpenters in the Massena area, was fixed by the Secretary of Labor's determination of August 10, 1942, the proposed modification of that determination would solve petitioner's problem by changing the basis for the "freezing" provision of the executive order, thereby making it possible for petitioner to pay the higher rate without violating Section 5 (a) of the Stabilization Act of 1942, 56 Stat. 767, 50 U. S. C. App. 965 (a), under which Executive Order No. 9250 was issued. When petitioner's representatives intimated that they agreed to the condition in the proposal, the modification was made (R. 34–35).

Certainly, there was nothing about this procedure which misled petitioner. Although the court below found that petitioner used the $1.25 per hour rate in preparing its bid on the second contract, it also found that petitioner at that time had some hope that carpenters would be released from other work at such times and in such num-

bers that they could be obtained for the second contract at the $1.25 rate (R. 30). Petitioner knew, however, that it had been paying $1.35 per hour regularly to its carpenters on the first contract in the same community, and by using the $1.25 rate in preparing its bid on the second contract, it deliberately took the risk of being able to procure carpenters to work for that wage. It was a business gamble, and petitioner lost, because the carpenters refused to work for less than $1.35 per hour (R. 30–31). Having lost on its gamble, petitioner may not now pass its loss on to the Government.

2. Petitioner contends in connection with Item III of its Claim, that it is entitled to recover compensation for the cost of realigning piers which had been displaced by frost action. However, there is no question that petitioner was required by the contract to "* * * provide temporary heating, covering, and enclosures as necessary * * * to protect all work and material against damage by dampness and cold * * *" (R. 42.) The court below found that in the absence of superstructures being placed on the piers, the only feasible method of protecting them against frost action would have been by placing earth around them (R. 42). Petitioner asserts (Pet. 21–22) that to do this would have required it to provide fill, and that the necessity of grading as such was excluded from the contract by a

paragraph of the specifications which provided (R. 42):

> (f) Grade areas under buildings to levels shown on plants [sic]. If existing grades are lower, no fill need be provided. * * *

Undoubtedly this provision in the specifications relieved petitioner of any obligation to provide fill merely for the purpose of changing the grade. However, it does not follow that this provision also relieved petitioner of the positive obligation to protect all work against damage by cold, merely because the only feasible method of furnishing such protection was by providing fill. In such circumstances, providing fill is not grading as such but is furnishing protection from frost. The holding of the court below that it was the duty of petitioner to provide such protection is not in conflict with any of the cases cited by petitioner (Pet. 22), and is, we submit, entirely correct. Moreover, petitioner failed to invoke the appeal provisions of Article 15 of the contract (R. 46) and was thus precluded from raising this question in the Court below. Cf. *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Holpuch Co.*, 328 U. S. 234, 240.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decision. The

petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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JANUARY 1948.

APPENDIX

1. The pertinent provisions of the Davis-Bacon Act of March 3, 1931, as amended, c. 411, 46 Stat. 1494; 49 Stat. 1011; 54 Stat. 399; 40 U. S. C. 276a, are as follows:

> The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, or the Territory of Alaska, or the Territory of Hawaii in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly

upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, * * *.

2. Executive Order No. 9250, 7 F. R. 7871, provides in part:

TITLE II—WAGE AND SALARY STABILIZATION POLICY

1. No increases in wages rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases.

2. The National War Labor Board shall not approve any increase in the wage rates prevailing on September 15, 1942, unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards of living, to correct gross inequities, or to aid in the effective prosecution of the war.

* * * * *

3. The specifications of contract NY-30083 provided in part as follows:

6. Rates of Wages.

a. There shall be paid each mechanic or laborer of the Contractor or any subcontractor engaged in work on the project under the Contract in the trade or occupation listed below, not less than the hourly wage

rate set opposite the same, regardless of any contractual relationship which may be alleged to exist between the Contractor or any subcontractor and such laborers and mechanics.

Under Division 2—Excavating and Grading—Section 7:

(f) Grade areas under buildings to levels shown on plants [sic]. If existing grades are lower, no fill need be provided. * * *.

4. The general conditions of contracts NY-30082 and NY-30083 contained the following provisions:

CARE OF WORK

a. The Contractor shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

b. The Contractor shall provide temporary heating, covering, and enclosures as necessary and to the satisfaction of the Contracting Officer to protect all work and material against damage by dampness and cold, to dry out the buildings properly, and to facilitate completion of the work: * * *

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